Joseph Lee Yok Min @ Ambrose v Mayban Securities Sdn Bhd, Ipoh Branch (formerly known as Phillleoallied Securities Sdn Bhd) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(IM)-555–12 OF 2012
RAUS SHARIF PCA, CLEMENT SKINNER AND AZAHAR MOHAMED JJCA
27 JANUARY 2014

Bankruptcy — Practice and procedure — Proof of debt — Receiver rejected proof of debt — Application challenging receiver's decision allowed by High Court — Appeal against High Court order — Preliminary objections — Procedural requirements — Whether appellant had locus standi to appeal — Whether record of appeal was incomplete and defective — Whether debt was provable debt — Rules of the Court of Appeal 1994

The appellant, who was the alter ego of two companies, had instructed both these companies to open a share margin account with the first respondent. The accounts were in effect managed by the appellant, who not only provided the required collateral but also gave instructions to the first respondent as to what shares to purchase. When the account incurred a loss, and neither the appellant nor the two companies made any payments to the first respondent, thefirst respondent instituted a civil suit against the appellant and the two companies. Before the trial of this suit, a receiving order ('RO') was made against the appellant that resulted in the Director General of Insolvency being constituted as the receiver of the appellant's estate ('the receiver'). Pursuant to the RO, the first respondent filed a proof of debt ('POD') against the estate of the appellant. The receiver rejected the POD on the grounds that the debt was not a provable debt under s 40 of the Bankruptcy Act 1967 ('the Act').Consequently the first respondent filed an originating summons application ('OS') challenging the receiver's decision to reject the POD. The High Court judge allowed the first respondent's application and ordered the receiver to accept the first respondent's claim as stated in the POD. This was the appellant's appeal against that decision. It was the appellant's contention that the receiver's decision to reject the POD was correct and should not have been overturned by the High Court judge. The first respondent raised two preliminary objections to this appeal, namely on the grounds that the appellant had no locus standi to appeal and that the record of appeal filed was incomplete.

Held, dismissing the appeal with costs of RM10,000:

(1) There was merit in the first respondent's argument that the appellant had

no locus standi. The appellant was never a party to the first respondent's OS application and there was no proper application by him to intervene into the proceedings at the High Court or the Court of Appeal (see para 6).

(2) The record of appeal filed by the appellant did not contain the notes of proceedings, grounds of decision and the sealed order of the High Court. According to r 18(4)(b), (d) and (e) of the Rules of the Court of Appeal 1994, non-inclusion of the said three items in the record of appeal, was not an irregularity but a nullity. As such the record of appeal was defective and it was tantamount to no record of appeal having been filed. On this ground alone this appeal should have been dismissed with costs (see paras 8–9).

(3) Even if there was no procedural fatal flaw, the appeal lacked merit. Based on the first respondent's affidavit in support and exhibits therein, which remained unrebutted and therefore deemed admitted, the debt claimed was in fact incurred by the appellant. The debt was clearly one which was present, certain and which the appellant was subject to at the date of the RO. Hence it was a debt provable in bankruptcy under s 40 of the Act. Further, after the RO was entered, the appellant had neither disputed it nor queried the amount stated in the POD (see paras 10–12).

[Bahasa Malaysia summary

Perayu, alter ego dua syarikat, telah mengarahkan kedua-dua syarikat ini membuka akaun margin saham dengan responden pertama. Akaun-akaun tersebut diuruskan oleh perayu, yang bukan sahaja memperuntukkan kolateral yang dikehendaki tetapi juga arahan-arahan kepada responden pertama saham apakah untuk dibeli. Apabila akaun-akaun mengalami kerugian, dan bukan perayu ataupun kedua-dua syarikat membuat apa-apa bayaran kepada responden pertama, responden pertama memulakan tindakan sivil terhadap perayu dan kedua-dua syarikat. Sebelum perbicaraan tindakan ini, perintah penerimaan ('PP') dibuat terhadap perayu dan mengakibatkan Ketua Pengarah Insolvensi dilantik sebagai penerima estet perayu ('penerima'). Berikutan PP, responden pertama memfailkan bukti hutang ('BH') terhadap estet perayu. Penerima menolak BH atas alas an bahawa hutang bukan hutang yang boleh dibuktikan di bawah s 40 Akta Kebankarapan 1967 ('Akta'). Akibatnya responden pertama memfailkan permohonan saman pemula ('SP') mencabar keputusan penerima kerana menolak BH. Hakim Mahkamah Tinggi membenarkan permohonan responden pertama dan mengarhkan penerima menerima tuntutan responden pertama seperti yang dinyatakan di dalam BH. Ini adalah rayuan perayu terhadap keputusan tersebut. Adalah hujahan perayu bahawa keputusan penerima untuk menolak BH adalah betul dan patut tidak ditolak oleh hakim Mahkamah Tinggi. Responden pertama membangkitkan dua bantahan permulaan kepada rayuan ini, iaitu atas alasan bahawa perayu

tidak mempunyai locus standi untuk merayu dan bahawa rekod rayuan yang difailkan adalah tidak lengkap.

Diputuskan, menolak rayuan dengan kos RM10,000:

(1) Terdapat merit dalam hujahan responden pertama bahawa perayu tidak mempunyai locus standi. Perayu tidak pernah menjadi pihak kepada permohonan SP responden pertama dan tiada permohonan yang betul dibuat olehnya untuk campur tangan dalam prosiding di Mahkamah Tinggi atau Mahkamah Rayuan (lihat perenggan 6).

(2) Rekod rayuan difailkan oleh perayu tidak mengandungi nota-nota prosiding, alasan keputusan dan perintah dimeterai Mahkamah Tinggi. Mengikut kepada k 18(4)(b), (d) dan (e) Kaedah-Kaedah Mahkamah Rayuan 1994, ketidak masukkan ketiga-tiga item tersebut dalam rekod rayuan, bukan luar aturan tetapi tak sah. Dengan itu rekod rayuan adalah cacat dan ia seperti tiada rekod rayuan difailkan. Atas alasan ini sahaja rayuan ini patut ditolak dengan kos (lihat perenggan 8–9).

(3) Walaupun jika tidak terdapat kecacatan prosedur, rayuan tidak mempunyai merit. Berdasarkan atas afidavit sokongan responden pertama dan ekshibit-ekshibit di dalamnya, yang kekal tidak dipatahkan dan oleh itu dianggap dimasukkan, hutang yang dituntut sebenarnya dialami oleh perayu. Hutang jelas terdapat, pasti dan yang mana perayu tertakluk kepada tarikh PP. Maka ia adalah hutang yang boleh dibuktikan dalam kebankrapan di bawah s 40 Akta. Selanjutnya, selepas PP dimasukkan, perayu tidak mempertikaikannya atau tidak menyoal jumlah yang dinyatakan di dalam BH tersebut (lihat perenggan 10–12).]

Cases referred to

Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193; [2000] 1 CLJ 269, CA (refd)
Chuah Tim Lan v RHB Bank Bhd & Anor [2008] 6 MLJ 793; [2008] 6 CLJ 500, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 AMR 631, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 40, 40(3)
Courts of Judicature Act 1964 s 42(1)
Rules of the Court of Appeal 1994 r 18(4)(b), (d), (e)

Appeal from: Originating Summons No 24–17 of 2005 (High Court, Kota Kinabalu)

Rim Lee (J Ambrose & Partners) for the appellant.
Christopher KH Chong (Lind Willie Wong & Chin) for the first respondent.

Director General of Insolvency for the second respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This was an appeal by the appellant, Joseph Lee Yok Min @ Ambrose against the decision of the learned High Court judge who had allowed the first respondent's originating summons for the following orders against the second respondent:

(a) that the decision of the Director General of Insolvency, acting as receiver of the estate of Joseph Ambrose Lee, in rejecting the plaintiff's proof of debt dated 10 February 2003 in the sum of RM18,756,868.50 be reversed; and

(b) that the Director General of Insolvency accepts and fully admits the plaintiff's claim as stated in the said proof of debt.

[2] We heard the appeal, wherein at its conclusion we unanimously dismissed it with costs in the sum of RM10,000. We now give our reasons for so deciding.

[3] The brief antecedent facts of the case giving rise to this appeal can be gleaned from the unopposed first respondent's affidavit in support of its originating summons (see record of appeal, Part B pp 1–14). The appellant was the alter ego of two companies, namely, Lapan Jaya Enterprise Sdn Bhd ('Lapan Jaya') and Disporex Sdn Bhd ('Disporex'). Under the instructions of the appellant, Lapan Jaya and Disporex opened a shares margin account with the first respondent. The appellant provided the collateral and was also the beneficiary of the contra gains from the share trading. The appellant also gave instructions to the first respondent as to what shares to purchase and when there are contra loses, the appellant will make proposals to settle the outstanding. The account incurred a loss and subsequently, neither the appellant, Lapan Jaya or Disporex made payments to the first respondent. The first respondent therefore instituted a civil claim against the appellant, Lapan Jaya and Disporex at the Kuala Lumpur High Court via Civil Suit No D1-22–879 of 1998. The civil action is based on the first respondent's assertion that at all material times, the appellant is solely responsible for the losses sustained by the first respondent under Lapan Jaya and Disporex's accounts.

[4] Before the trial of the suit, a receiving order ('RO') was made on 22 May 2001 against the appellant resulting in the second respondent being constituted as the receiver of the appellant's estate. Pursuant to the RO, the first respondent filed a proof of debt ('POD') on 21 February 2003 against the estate of the appellant claiming a total amount of RM18,756,868.50. The second respondent, as receiver of the appellant's estate had on 1 February 2005

rejected the POD on the grounds that the debt is not a provable debt under s 40 of the Bankruptcy Act 1967 ('the Act'). Consequently, the first respondent took out the originating summons herein, which is the subject matter of the present appeal. As we have indicated earlier, the learned High Court judge allowed the first respondent's originating summons.

[5] Before us, learned counsel for the first respondent raised two preliminary objections. First, the appellant has no locus standi to appeal and secondly, the record of appeal is incomplete.

[6] On the issue of locus standi, we found there is merit in the arguments of learned counsel for the first respondent. The point to be made here is that the appellant was never a party to the originating summons before the learned High Court judge. There were so no proper applications to intervene into the proceedings whether at the High Court or the Court of Appeal.

[7] On the second issue, there can be no doubt that the record of appeal is incomplete as it does not contain:

(a) notes of proceedings;

(b) grounds of decision; and

(c) sealed order dated 12 January 2006.

[8] The appellant has not shown any proof that he had applied for the three items above. According to Practice Direction No 2 of 1991, one week after the notice of appeal is filed, the appellant has to apply to the judge's secretary to be supplied with a copy of the notes of proceedings. In the circumstances, in our judgment, the non-compliance with the Practice Direction and r 18(4)(b), (d) and (e) of the Rules of the Court of Appeal 1994, where copy of the judgment appealed from, notes of proceedings and grounds of judgment was not included in the record of appeal, was not an irregularity but a nullity (see *Chuah Tim Lan v RHB Bank Bhd & Anor* [2008] 6 MLJ 793; [2008] 6 CLJ 500 and *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] 1 MLJ 193; [2000] 1 CLJ 269).

[9] For reasons aforesaid, the first respondent's preliminary objection was upheld. We held that the record of appeal is defective; it tantamount to no record of appeal having being filed. On this ground alone this appeal must be dismissed with costs.

[10] But even having said this procedural fatal flaw, we found the appeal lacked merit. It was argued by learned counsel for the appellant that that the second respondent's decision to reject the POD was correct and should not

have been overturned by the learned High Court judge. Learned counsel argued that the appellant was not the borrower of the loan nor the guarantor of Lapan Jaya and Disporex and that there was no final judgment in favour of the first respondent.

[11] On the facts of the present case, we do not agree with the contention of learned counsel for the appellant. Now, s 40(3) of the Act, with the necessary emphasis, states:

> Save as provided in sub-sections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred, before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

In our judgment based on the first respondent's affidavit in support and the exhibits therein, which remains unrebutted and is therefore deemed admitted, the debt amounting RM18,756,868.50 in this case was in fact incurred by the appellant (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 631). As we have emphasised earlier, the undisputed fact is that the appellant was the alter ego of Lapan Jaya and Disporex. The appellant instructed both the companies to open a shares margin account with the first respondent and provided the required collateral. The appellant gave instructions to the first respondent as to what shares to purchase. The appellant was the beneficiary of the contra gains from the share trading and when there were contra losses, the appellant would make proposals to settle the outstanding. The appellant was therefore responsible for the losses amounting RM18,756,868.50 incurred by the first respondent under the accounts of Lapan Jaya and Disporex. In our judgment, the debt is clearly one which is present, certain and which the appellant is subject to at the date of the RO. Hence, it is a debt provable in bankruptcy under s 40(3) of the Act.

[12] Even more, after the RO was entered, the appellant did not dispute to the POD filed by the first respondent or its representative presence during the first creditors' meeting. The first creditors' meeting was held on the 24 June 2004. The first respondent's representative was present as can be confirmed by the minutes of meeting. The appellant and his counsel was at the said meetin and if the appellant was not indebted to the first respondent, he would naturally have indicated this at the meeting. Neither the appellant nor his counsel queried the amount of RM18,756,868.50 stated in the POD.

[13] In the result, we had unanimously dismissed this appeal with costs in the sum of RM10,000 to the first and second respondents. We ordered that the deposit to be refunded to the appellant.

[14] This judgment is prepared pursuant to s 42(1) of the Courts of Judicature Act 1964 as our learned brother Clement Allan Skinner, JCA has since retired.

Appeal dismissed with costs of RM10,000.

Reported by Kohila Nesan